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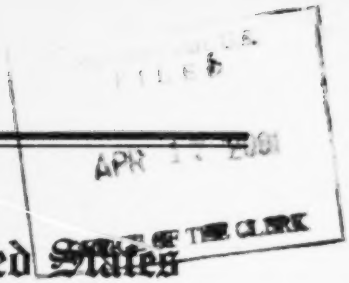

IN THE

Supreme Court of the United States

BATH PETROLEUM STORAGE, INC.,

Petitioner,

v.

MARKET HUB PARTNERS, L.P., MARKET HUB PARTNERS, INC., MARKET HUB HOLDING COMPANY, AND COALITION FOR RESOURCES AND ENVIRONMENT IN THE SOUTHERN TIER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MARKET HUB PARTNERS, L.P. AND MARKET HUB PARTNERS, INC.

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CORPORATE DISCLOSURE STATEMENT

Market Hub Partners, L.P. ("MHP LP") and Market Hub Partners Inc. ("MHP Inc.") are both indirectly wholly owned by Duke Energy Corp., a publicly traded company. All of the liabilities associated with MHP LP and MHP Inc. in this litigation remain 100% with NiSource Inc. ("NiSource"), a publicly traded company that previously indirectly wholly owned MHP LP and MHP Inc.

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INTRODUCTION AND SUMMARY OF REASONS FOR DENYING THE WRIT

Respondents Market Hub Partners, L.P., and Market Hub Partners, Inc. (collectively "MHP") respectfully urge the Court to deny the petition for a writ of certiorari. The decision below does not merit review. The Second Circuit's unpublished order summarily affirmed an unpublished district court decision that turned on a detailed and case-specific analysis of technical, scientific, and geologic evidence contained in the administrative record of multiple federal and state agency proceedings. After thoroughly reviewing the record, the district court rejected Petitioner's claims on the merits, based on lack of proximate cause, as well as on the basis of *Noerr-Pennington* immunity. The issues Petitioner attempts to raise are not squarely presented by the record in this case.

Moreover, contrary to the arguments in the petition, there is no "broad conflict" in the circuits regarding the applicability of *Noerr-Pennington* immunity beyond the Sherman Act. The circuits have recognized that the *Noerr-Pennington* doctrine rests on an explicit First Amendment basis and have routinely dismissed claims such as this one challenging core petitioning activity. Nor has any court adopted Petitioner's view that the "sham" exception to *Noerr-Pennington* immunity requires only the bare allegation of a single misrepresentation in an administrative proceeding without any showing that the misrepresentation had a significant effect on the decision-making process.

Petitioner's proposed restriction of *Noerr-Pennington* to the Sherman Act, and narrowing of the immunity standard, would have serious federalism implications. It would open

up state judicial and administrative proceedings to indirect federal collateral attack under federal statutory causes of action. If adopted, every agency proceeding could spawn a follow-on Sherman Act or RICO treble damages action based on characterizations of an opponent's arguments as "intentionally false." For this reason, and to avoid the chilling effect on protected First Amendment petitioning activity, the circuits have applied *Noerr-Pennington* immunity uniformly in the same way that it was applied here. The courts below followed a consistent line of authority giving full effect to this Court's *Noerr-Pennington* decisions in rejecting this garden-variety antitrust and RICO collateral attack on participation in state and federal regulatory proceedings.

Accordingly, the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. The Second Circuit's Unpublished Summary Affirmance Of The District Court's Unpublished Decision Does Not Merit Review.

Even if there were any support for Petitioner's alleged "broad conflict" in the circuits regarding the applicability and scope of the *Noerr-Pennington* doctrine, there are no "compelling reasons" for this Court to grant review in this case. *See* Sup. Ct. R. 10.

First, the Petition seeks review of an unpublished summary affirmance of an unpublished district court decision. The Second Circuit's summary order does not constitute a formal opinion of the court and cannot be cited or otherwise used in unrelated cases before the Second

Circuit or any other court. *See* 2d Cir. R. 0.23. Accordingly, even if the Second Circuit's decision somehow conflicted with the decisions of other courts, which it does not, review would not be justified here. Cases involving the applicability of *Noerr-Pennington* to claims similar to those alleged here are commonplace in the federal and state courts, and this Court has not granted review of any of the decisions that have considered the issues in far more depth than the unpublished decision of the Second Circuit. *See, e.g.*, *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885 (10th Cir.), *cert. denied*, 121 S. Ct. 175 (2000); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir.), *cert. denied*, 528 U.S. 871 (1999); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056 (9th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999). To the extent any conflict develops, this Court's review would benefit from a decision that squarely addresses the issues and develops them to the extent necessary to facilitate more meaningful consideration on certiorari.

Second, review is not warranted because the Second Circuit's summary affirmance turned on a "detailed factual record [] set out by the district court." Pet., App. 2a, 20a-42a. Based on an exhaustive review of the administrative record in a thorough opinion, the district court determined that Petitioner could not establish how any of the Respondents' alleged misstatements had any effect on the administrative proceedings. *See id.* The decision was consistent with the way *Noerr-Pennington* immunity has been applied in other courts.

Petitioner's effort to expand its underground natural gas storage facility required regulatory approval and triggered federal and state agency proceedings. In the agency

proceedings, Respondents submitted expert declarations regarding interpretation of complex geologic data associated with the underground facility and provided information relating to regulatory, economic, environmental and safety issues associated with the project. Petitioner asserted below that these submissions were false, that these false statements somehow led to delays in permitting, and that these delays caused a third party (CNG Transmission Corp. ("CNGT")) to breach an agreement with Petitioner to lease the facility. Pet., App. 2a. The district court properly and carefully analyzed the public record of each of the agency proceedings in dismissing Petitioner's claims.

FERC Proceedings. Petitioner asserted below that the Respondents fraudulently delayed FERC proceedings relating to approval of Petitioner's natural gas storage permit. However, as the district court determined, MHP did not initiate those proceedings and MHP's participation in the proceedings was well-grounded in established agency procedures. *See id.* at 33a. MHP made three filings in that proceeding. The first filing (on August 15, 1996) argued that under settled law FERC should require Petitioner to cease and desist from development activities at Petitioner's proposed gas storage facility prior to obtaining FERC approval. *Id.* at 34a. FERC agreed with that legal argument and Petitioner did not contend below that MHP's legal position was incorrect. *Id.* MHP's second filing (on August 28, 1996) dealt solely with regulatory rates that CNGT had proposed to charge its customers. *Id.* Numerous parties made filings opposing CNGT's proposals based on the same economic arguments raised by MHP. *Id.* Petitioner did not challenge any statements made in the August 28 filing. *Id.* MHP's third filing (on December 26, 1996), like its second filing, primarily addressed regulatory rates CNGT proposed to charge its customers, and Petitioner did not contest those statements either. *Id.*

Petitioner's lawsuit focused narrowly on a few of MHP's statements in the third FERC filing regarding geological, scientific and environmental issues raised by the proposed project. *Id.* at 34a-35a. But as the district court concluded, "the fact is that the New York [Department of Environmental Conservation ("NYDEC")] brought these issues to FERC's attention before MHP filed any papers with FERC." *Id.* at 33a. Many of the potential problems at the site were based on uncontested evidence of the history of Petitioner's operations, and other statements were subject to good-faith disagreement and were carefully considered in the administrative forum. *Id.* at 35a. The district court concluded that Respondents had "probable cause" for their comments in the FERC proceeding. *Id.* Relatedly, the district court concluded that Petitioner failed to demonstrate how the Respondents caused any agency "delay" or caused CNGT to breach its lease agreement with Petitioner. *See id.* at 40a. As the district court pointed out, numerous parties other than Respondents participated in the proceedings, and CNGT's breach of its lease followed its apparent miscalculation that Petitioner could begin work on the storage project prior to obtaining FERC approval, which FERC properly did not allow. *Id.* at 41a-42a.

NYDEC Proceedings. Petitioner's proposal to expand its natural gas storage caverns required a modification of Petitioner's State Pollution Discharge Elimination System permit by NYDEC. Petitioner alleged that Respondents somehow prompted the modification proceeding to delay the project. But as the district court determined from the administrative record, the permit modification proceeding was initiated by NYDEC, not by the Respondents. *Id.* at 36a. Petitioner also alleged that Respondents formed a "sham" environmental group — Coalition for Resources and

Environment in the Southern Tier, Inc. ("CREST") — to participate in the proceedings. But as the district court noted, the administrative record showed that Petitioner challenged the involvement of CREST at the administrative level and the NYDEC Administrative Law Judge expressly considered CREST's alleged affiliation with MHP. *See id.* Petitioner also alleged false statements made by CREST in the proceeding concerning environmental and safety risks associated with the project. But again, as the district court determined, the ALJ accepted many of those positions as consistent with the law and the evidence. The ALJ deemed many of the statements Petitioner highlights in this lawsuit — concerning an alleged geological fault at the site and other environmental concerns — to be beyond the scope of the NYDEC proceeding. *Id.* at 36a-37a. Accordingly, they were immaterial. In any event, as the district court determined, the NYDEC proceedings had nothing to do with Petitioner's alleged harm — CNGT's breach of its lease — because "CNGT breached its agreement long before the DEC and EPA proceedings were ever completed." *Id.* at 40a.

EPA Proceedings. Petitioner also alleged in its complaint that Respondents delayed EPA proceedings concerning Petitioner's natural gas storage project. Again, however, the district court determined from the public record that the EPA proceedings were not initiated by any actions by MHP or the other Respondents. The proceedings were necessary for EPA approval of Petitioner's application for underground injection control permits. *See id.* at 37a. EPA held a public hearing and received public comments from many parties, including NYDEC. The other parties raised many of the same issues raised by the Respondents. *See id.* Nor did EPA suggest that any of the comments it received were frivolous or baseless, including the alleged

misstatements relating to the presence of a geological fault at the site. *Id.* at 38a. Accordingly, Petitioner could not establish how any of the statements, even if false, influenced the proceeding in any way. Nor could Petitioner establish how the Respondents independently caused any agency "delay," given the numerous similar comments received from other parties to the proceeding. Finally, as the district court noted, the immediate cause of Petitioner's alleged loss — CNGT's breach of contract — occurred long before the conclusion of the EPA proceedings. *See id.* at 40a.

In dismissing Petitioner's claims relating to the FERC, NYDEC, and EPA proceedings, the district court engaged in a straight-forward and fact-specific application of *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993) ("*PRE*"). All of the issues Petitioner raised in its federal lawsuit — including CREST's alleged affiliation with MHP and alleged misstatements relating to technical data and environmental concerns – were considered by the agency decisionmakers. Petitioner's argument that it should nonetheless be permitted to maintain a federal lawsuit challenging non-frivolous, substantial arguments that, in any event, did not affect the proceedings, is fundamentally inconsistent with *PRE*. Such a rule would sanction just the sort of open-ended inquiry into parties' motives, and agency decisionmakers' rationales, that every circuit applying *PRE* has sought to avoid in cases similar to this one. *See, e.g., Cheminor*, 168 F.3d 119; *Kottle*, 146 F.3d 1056. The Second Circuit's unpublished decision is perfectly consistent with the treatment of core petitioning immunity by other courts and therefore does not merit review.

Third, review is not warranted because even if Petitioner's attempt to restrict *Noerr-Pennington* immunity

and to alter the immunity standard applied by the lower courts could succeed, Petitioner's claim would still fail in any event for failure to establish proximate cause. The district court determined that Petitioner's claims were barred not only under the *Noerr-Pennington* doctrine but also failed on the merits. There is no way for Petitioner to establish, based on the underlying public record, that any statements the Respondents made independently "delayed" the proceedings or that the Respondents caused CNGT to breach its lease with Petitioner. *See* Pet., App. 38a-42a. Accordingly, even if Petitioner's *Noerr-Pennington* arguments merited consideration by this Court (which they do not), review should await a case where resolution of the issues could have an effect on the lower court proceedings. Here, it is clear that Petitioner's claim cannot succeed under any theory or cause of action, irrespective of the *Noerr-Pennington* doctrine.

Accordingly, the petition for a writ of certiorari should be denied.

II. The Circuits Are In Agreement That *Noerr-Pennington* Immunity Applies To All Petitioning Activity.

Petitioner argues that review should be granted to resolve a "broad conflict" in the circuits regarding the applicability of *Noerr-Pennington* to petitioning activity outside the context of the Sherman Act. *See* Pet. at 10-11. Petitioner also argues that the Court should determine that the *Noerr-Pennington* doctrine does not immunize the core petitioning activity at issue here. *Id.* at 15-21. Contrary to the Petition, however, there is no conflict in the circuits. No reason exists to restrict the First Amendment principles upon which *Noerr-Pennington* immunity is based.

First, there is no conflict in the circuits. The circuits have uniformly recognized the First Amendment basis of *Noerr-Pennington* immunity. *See, e.g., Int'l Bhd. of Teamsters v. Philip Morris, Inc.*, 196 F.3d 818, 826 (7th Cir. 1999); *Kottle*, 146 F.3d at 1059; *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18, 20 (2d Cir. 1980). For this reason, the courts have applied the doctrine to non-Sherman Act federal and state causes of action arising out of petitioning activity. *See, e.g., Cheminor*, 168 F.3d 119; *Kottle*, 146 F.3d 1056; *Tarpley v. Keistler*, 188 F.3d 788 (7th Cir. 1999); *Sunwest Assocs. v. Davis*, 99 F.3d 1147 (9th Cir. 1996); *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292 (6th Cir. 1992), *cert. denied*, 508 U.S. 957 (1993); *South Dakota v. Kansas City S. Indus.*, 880 F.2d 40 (8th Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990); *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075 (5th Cir. 1988), *cert. denied*, 490 U.S. 1047 (1989).

In spite of an overwhelming and consistent line of authority broadly applying the *Noerr-Pennington* doctrine to all petitioning activity, Petitioner claims that there is a conflict in the circuits based principally on a single, sharply-divided Tenth Circuit decision, *Cardtoons*, 208 F.3d 885. But *Cardtoons* did not involve petitioning activity. Rather, *Cardtoons* involved state law claims that arose out of *pre*-litigation threats communicated between private parties. *See id.* at 887. The Tenth Circuit never questioned the fundamental principle that *Noerr-Pennington* immunity would apply to core petitioning activity. Here, there is no issue concerning such pre-petitioning activity; rather, Petitioner seeks to subject the Respondents to treble damages for their direct participation in public administrative proceedings. This activity is at the heart of the First Amendment. *Cardtoons* is inapposite.

Nor do the two other decisions invoked by Petitioner support its claimed conflict in the circuits. *See* Pet. at 11. The Fifth Circuit's decision in *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1364-65 (5th Cir. 1983) suggested that *Noerr* "was not a first amendment decision," but expressly acknowledged the important First Amendment underpinnings of *Noerr*. *See id.* But more important, *Coastal States Marketing* did not address the applicability of *Noerr-Pennington* to non-Sherman Act causes of action. *See id.* In any event, the Fifth Circuit has subsequently acknowledged the First Amendment basis of *Noerr-Pennington* immunity and has applied the doctrine to immunize petitioning activity outside the Sherman Act context. *See Video Int'l Prod.*, 858 F.2d 1075. The third decision invoked by the Petitioner, *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995), declined to address the applicability of *Noerr-Pennington* to state law claims but suggested that in certain circumstances application of state law causes of action to petitioning activity could violate the First Amendment. *See id.* at 1254. The "broad conflict" in the circuits suggested by Petitioner (at 10) does not exist.

Second, contrary to Petitioner's suggestion that *Noerr-Pennington* immunity should not apply outside the Sherman Act context, this Court has repeatedly acknowledged the First Amendment basis of the doctrine. Although the doctrine arose out the Sherman Act, it stands for the proposition that "the First Amendment protects the right of corporations to petition legislative and administrative bodies." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.31 (1978) (citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)). The Court made clear in *California Motor Transport* that

the First Amendment right to petition underlays the *Noerr-Pennington* doctrine. *See* 404 U.S. at 510-11. The Court has subsequently cited *California Motor Transport* as a First Amendment decision. *See, e.g., McDonald v. Smith*, 472 U.S. 479, 484 (1985). And in *PRE*, the Court noted that *Noerr*'s First Amendment principles have been applied beyond the antitrust context. *See* 508 U.S. at 59 (citing *Bill Johnson's Rest., Inc. v. NLRB*, 461 U.S. 731, 743-33 (1983) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)).

Accordingly, even if the *Noerr-Pennington* doctrine is technically a "construction of the Sherman Act" (Pet. at 15-16), this Court's decisions make clear that such a construction was based entirely on principles arising from the First Amendment itself. The Court's *Noerr-Pennington* decisions have determined that the Sherman Act could not have been meant to impinge upon important First Amendment rights. *See, e.g., California Motor Transp.*, 404 U.S. at 510-11; *Primetime 24 Joint Venture v. Nat'l Broad. Co., Inc.*, 219 F.3d 92, 99 (2d Cir. 2000) (Winter, C.J.) ("Having noted in *Noerr* the 'important constitutional questions' implicated by the right to petition the legislature . . . , the Supreme Court later made explicit its reliance on First Amendment principles — albeit as an interpretation of the Sherman Act itself — in extending *Noerr* to apply to concerted actions before courts and administrative agencies."). The First Amendment's protection of petitioning activity does not cease to apply under the federal racketeering statute or under state law.

Contrary to Petitioner's argument, there is nothing peculiar to the antitrust laws that justifies broader First Amendment immunity than the racketeering laws. The antitrust laws, like RICO, reach intentional and criminal conduct. As the Court squarely held in *PRE*, immunity

applies irrespective of evidence of an anticompetitive purpose or intent. *See* 508 U.S. at 60. Accordingly, the fact that RICO reaches intentional criminal conduct does not justify Petitioner's suggested wholesale rejection of *Noerr-Pennington* immunity in the RICO context. While a RICO lawsuit may establish criminal conduct that is beyond the protections of the *Noerr-Pennington* doctrine — for example, where the challenged petitioning activity is objectively unreasonable, based on material misrepresentations, or involves bribery — the underlying record here establishes that this is not such a case. Accordingly, review is not warranted to address this issue.

Petitioner's argument that immunity does not apply to the state law claims also does not merit review. The state law claims alleged violations of the New York antitrust statute, violations of New York consumer protection law, tortious interference with contract, and common law fraud. *See* Pet., App. 89a-95a. Clearly, irrespective of Petitioner's arguments, the doctrine applies to Petitioner's state antitrust claim, because the state antitrust laws are modeled on and governed by the same standards as the federal antitrust laws. *See, e.g., State v. Mobil Oil Corp.*, 344 N.E.2d 357, 359 (N.Y. 1976). The doctrine also applies to the other state law claims. Indeed, New York courts have applied the doctrine to the same New York state law claims that are at issue here. *See, e.g., Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*, 707 N.Y.S.2d 647 (App. Div. 2000). New York courts have also, as a matter of state public policy, held that tortious interference claims should not be extended "to those situations wherein a citizen petitions an agency of his government." *Rudoff v. Huntington Symphony Orchestra, Inc.*, 397 N.Y.S.2d 863, 865 (N.Y. Sup. Ct. 1977). The principles underlying *Noerr-Pennington* are fully applicable

to the core petitioning activity at issue here, irrespective of how that conduct is labeled or how Petitioner's challenge is framed.

Petitioner suggests that applying *Noerr-Pennington* immunity to state law causes of action raises federalism concerns. *See* Pet. at 20-21. However, Petitioner's attempt to restrict the *Noerr-Pennington* doctrine to the Sherman Act and to broaden the fraud exception to *Noerr-Pennington* immunity to encompass immaterial misrepresentations would have serious federalism implications. Absent meaningful immunity for core petitioning activity, disappointed participants in state agency and judicial proceedings would be able to invoke the federal courts as an open avenue of indirect collateral attack on state proceedings under the RICO statute or state law. Especially if immunity could be avoided based on the mere allegation of an immaterial misrepresentation (*see* Pet. at 21-24), state agency factual determinations would be subject to frequent relitigation in the federal courts. At the same time, there is no conflict between the *Noerr-Pennington* immunity standard applied by the courts below and the valid interests served by the underlying state law claims at issue here. It would be every bit as chilling of First Amendment rights to allow Petitioner to maintain its state law claims absent any objectively unreasonable conduct or material misrepresentations on the part of the Respondents as it would be to allow Petitioner to maintain its federal antitrust claims. And valid state law claims will often avoid *Noerr-Pennington* immunity because the underlying conduct necessary to satisfy the elements of the cause of action — fraud, for example, which requires materiality and reliance — will be sufficient to establish that immunity does not apply.

Because Petitioner's claimed broad conflict in the circuits does not exist, and there is no independent reason for this Court to consider whether immunity should apply in this case, the petition should be denied.

III. No Court Has Adopted Petitioner's Proposed "Misstatement" Exception To *Noerr-Pennington* Immunity And The Proposal Does Not Merit Review.

Petitioner also seeks review based on the argument that the Second Circuit's unpublished decision conflicts with other decisions regarding the scope of the "fraud exception" to *Noerr-Pennington* immunity. *See* Pet. at 12-15. Petitioner urges the Court to grant review in order to create an immunity exception that would apply to any allegation of a misrepresentation made in an adjudicatory proceeding, whether the misrepresentation was material or not. *See* Pet. at 21-24. However, there is no conflict in the circuits and Petitioner's proposed standard is untenable. Accordingly, review is not justified.

This Court in *PRE* left open the question "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." 508 U.S. at 62 n.6. Based on the suggestion in *California Motor Transport* that "[m]isrepresentations . . . are not immunized when used in the adjudicatory process," 404 U.S. at 513, some circuits have recognized a "fraud exception" to the *Noerr-Pennington* doctrine. However, contrary to Petitioner's argument, these circuits have required that the misrepresentation affect the legitimacy of the proceeding before the exception to *Noerr-Pennington* immunity applies. Applying the same analysis as the courts below in this case, the Third Circuit observed in *Cheminor* that "our approach

in requiring that misrepresentations must be *material* to bar *Noerr-Pennington* immunity is consistent with the two other circuit courts of appeals that have considered this issue." 168 F.3d at 124 n.12 (citing *Kottle*, 146 F.3d 1056 (recognizing exception for "intentional misrepresentations" that "deprive the litigation of its legitimacy") and *Whelan*, 48 F.3d 1247 (disallowing *Noerr-Pennington* immunity based on material misrepresentations to securities regulators)).

As Petitioner acknowledges, the Ninth Circuit's fraud exception "stems from an extension of the *Walker Process* doctrine." Pet. at 14. This Court in *PRE* cited *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), in reserving the question of whether a fraud exception should apply to *Noerr-Pennington* immunity. *See* 508 U.S. at 62 n.6. But contrary to Petitioner's argument, the *Walker Process* doctrine requires proof of a *material* misrepresentation before fraud in the *ex parte* patent application process can deprive the patent-holder of a patent defense to antitrust claims. *See Walker Process*, 382 U.S. at 176 (antitrust counterclaims may be maintained where there is evidence that the patent-holder "obtained the patent by knowingly and willfully misrepresenting the facts" as opposed to "technical fraud"). The Federal Circuit has applied the *Walker Process* doctrine to require "independent and clear evidence of deceptive intent together with a clear showing of reliance, *i.e.*, that the patent would not have issued but for the misrepresentation or omission." *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1071 (Fed. Cir.), *cert. denied*, 525 U.S. 876 (1998). The Third Circuit in *Cheminor* noted that the materiality element of the *Noerr-Pennington* fraud exception is consistent with *Nobelpharma* and *Walker Process*. *See Cheminor*, 168 F.3d at 124 n.12.

Petitioner's immaterial misrepresentation exception to *Noerr-Pennington* immunity is inconsistent with First Amendment values. As this Court has repeatedly made clear, the right to petition "[is] among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). The occasionally "erroneous statement is inevitable." *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964). Where, as here, review of the administrative record shows that the alleged misstatements had no effect on the proceedings and all objections to the statements were fully considered by the administrative decisionmakers in the first instance, it would only serve to chill First Amendment protected activity to allow collateral challenges to go forward. As previously explained, such a broad immunity exception would also sanction indirect federal court challenges of state proceedings based on nothing more than allegations that statements made in connection with a public administrative process were erroneous.

The district court carefully examined the allegations of misrepresentations in light of the entire public record, which showed that the agency decisionmakers themselves expressly considered the very allegations of falsehoods and sham participation by CREST that Petitioner attempts to relitigate in federal court. Petitioner could not demonstrate how any of the alleged misstatements affected the proceedings in any way. *See* Pet., App. at 3a, 29a-42a. Contrary to Petitioner's argument, the lower courts' common sense analysis is consistent with the approach adopted by other circuits and is fully faithful to the First Amendment.

Accordingly, the petition for a writ of certiorari should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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